In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 953

VINCENT MAURO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-2) is reported at 399 F. 2d 158. The opinion of the district court (Pet. App. A-3 to A-11) is reported at 280 F. Supp. 371.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1968. By order of Mr. Justice Harlan, the time for filing a petition for a writ of certio-

rari was extended until February 3, 1969, and on January 17, 1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was entitled to have set aside his plea of guilty to ten narcotic offenses on the basis of his allegation that at the time of the plea he was unaware he would be ineligible for parole.

STATEMENT

In 1961 petitioner was named as one of twenty defendants named in a thirty count indictment charging various violations of the federal narcotics laws (21 U.S.C. 173, 174). He pleaded not guilty, posted $50,000 bond, but became a fugitive before trial. Trial of ten other defendants was concluded in December 1961. See *United States* v. *Agueci*, 310 F. 2d 817 (C.A. 2), certiorari denied, 372 U.S. 959.

Early in 1962, petitioner was apprehended in the Azores and brought back to the United States. In 1962, he entered a guilty plea to bail jumping, and sentencing was deferred pending disposition of the narcotics case. On March 4, 1963, after selection of a jury, petitioner, who was represented by counsel of his own selection, pleaded guilty to all ten narcotics counts in which he was named. The court questioned petitioner as to the voluntariness of his plea and inquired into his understanding of its meaning and effect (Pet. App. A-14 to A-15). This questioning did not mention parole ineligibility or the sentence which

might be imposed. One week later, on March 11, 1963, petitioner, again represented by his counsel, appeared for sentencing. At the time of allocution, petitioner said: "please * * * take into consideration I am a first offender and the minimum sentence is five years" (App. 23).[1] Petitioner's counsel at that time stated he was not representing that petitioner was innocent (App. 24). The court sentenced petitioner to fifteen years' imprisonment on each count, to run concurrently. Petitioner was also sentenced to a concurrent five-year term for jumping bail.

About six weeks later, on April 30, 1963, petitioner moved for reduction of sentence. Paragraph 7d of his application stated that it was predicated upon the ground: "That no parole is available to the defendant." In paragraphs 8 and 17 the lack of parole eligibility for a narcotics law violator was also noted (App. 27-28). This motion was denied.

On September 25, 1967, petitioner instituted the present proceeding under 28 U.S.C. 2255, claiming that he had entered his guilty plea in ignorance of its consequences. Petitioner submitted an affidavit to the effect that, at the time of the guilty plea he did not know that he would be ineligible for parole (Pet. App. A-19 to A-24). Also submitted was an affidavit from his counsel stating that, while he had "assumed" petitioner knew he would be ineligible for parole, he had not expressly informed petitioner of this fact (Pet. App. A-16 to A-18). The trial court, after consider-

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[1] The court of appeals record on file with the Clerk of this Court has been consecutively paginated and is designated herein as "App.".

ing the affidavits and the record in the case, concluded that petitioner, at the time of the guilty plea, did know of his ineligibility for parole, but that in any event, even if the facts were as petitioner alleged, he would not be entitled to any relief (Pet. App. A-3 to A-11).

ARGUMENT

For the reasons discussed by the trial judge (Pet. App. A-8 to A-11), there is ample basis for the conclusion that petitioner was aware, at the time he entered his guilty plea, that he would be ineligible for parole. Petitioner's own counsel had not explicitly advised him of this circumstance because he "assumed that the Petitioner was aware of this" (Pet. App. A-17). At the time petitioner entered his plea, he was 47 years of age (App. 28) with a criminal record dating back to 1931 (App. 19). The charges against him involved a large scale narcotics conspiracy. Petitioner was a member of the "executive group" that "initiated the various importations and the subsequent distributions and sales of the narcotics" (see 310 F. 2d at 820-821). After his co-defendants were convicted and petitioner returned to the United States, he was held in federal custody in New York City from February 1962 until his plea in March 1963 (App. 19). Petitioner's age, criminal experience, criminal associates, and one year's residence in a federal lockup while waiting for his narcotics trial to start all suggest that petitioner knew the ancillary aspects of any sentence imposed for narcotic offenses. This conclusion is buttressed by the fact that barely a week after his plea, during allocution, petitioner himself asked

the sentencing judge to take into account that he was a first (narcotics) offender but that the minimum sentence was five years. Furthermore, although in April 1963—less than two months after his guilty plea—he expressly mentioned his ineligibility for parole in the course of seeking a reduction in sentence, more than four years elapsed "without any outcry of innocence or injustice" based upon a claim of ignorance of that fact at the time of his plea. *Pinedo* v. *United States*, 347 F.2d 142, 146 (C.A. 9), certiorari denied, 382 U.S. 976.

In any event, as the district judge held (Pet. App. A-6 to A-8), vacation of the conviction is not required because the judge failed to advise him that parole was unavailable before accepting his guilty plea. Awareness of punishment is only one of several factors to be considered in determining the propriety of the acceptance of the guilty plea. "It is not a factor which, alone and bare, demands in its absence a vacation of a sentence. The circumstances in each case are important." *Verdon* v. *United States*, 296 F. 2d 549, 553 (C.A. 8), certiorari denied, 370 U.S. 945. At the time of sentencing, petitioner knew that the minimum sentence under each count was five years and thus knew that he might receive at least a fifty year sentence if the trial court decided to impose minimum sentences but to run them consecutively. Petitioner's actual minimum imprisonment, 15 years, less possible good time allowance, is far less than one third the *maximum* imprisonment imposable (200 years) and is less than one third the maximum if minimum consecutive sentences had been imposed. Petitioner's personal his-

tory was such that he could not reasonably have expected to be a candidate for early parole. Under the circumstances, it is clear that an erroneous reliance upon the possibility of parole played no part in petitioner's deliberate decision to plead guilty after his jury had been selected and his co-defendants already convicted. See *Trujillo* v. *United States*, 377 F. 2d 266 (C.A. 5), certiorari denied, 389 U.S. 899; *Smith* v. *United States*, 324 F. 2d 436 (C.A.D.C.); *Simon* v. *United States*, 269 F. Supp. 738 (E.D. La.); see, also, *United States* v. *Parrino*, 212 F. 2d 919 (C.A. 2), certiorari denied, 348 U.S. 840.[2]

Contrary to petitioner's assertion (Pet. 9-11) the decision below does not rest on petitioner's inability to allege his innocence but on the court's finding, from the files and record, that his plea was in fact entered voluntarily and knowingly.

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[2] *In Munich* v. *United States*, 337 F. 2d 356 (C.A. 9), on which petitioner relies, the defendant pleaded guilty to only one count, so that ineligibility to parole might have affected his awareness of the maximum term. Moreover, that case must be read in the light of the facts there presented, where the judge made *no* inquiry under Rule 11 before accepting a plea of guilty and it was necessary for the government to overcome a presumption that the plea was not knowingly and voluntarily entered. Here the court did conduct an inquiry under Rule 11 before accepting the plea (see Pet. App. A-14 to A-15).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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